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In the

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 152

MARY C. ROBERTS, ADMINISTRATRIX, ET AL.,
Plaintiffs, Appellants, Petitioners,

v.

UNITED FISHERIES VESSELS COMPANY,
Defendant, Appellee, Respondent.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF PETITION.

H. S. AVERY,
Attorney for Petitioners.

A. L. KAPLAN,
of Counsel.

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L. H. LANE COMPANY, LAW PRINTERS, 221 HIGH ST., BOSTON, MASS.

TABLE OF CONTENTS.

PETITION.

	Page
Jurisdiction	1
The Questions Presented	2
Statutes Involved	2
Statement of the Case	4
Statement of Points Relied Upon in Appeal to Circuit Court	5
Reasons Submitted for the Allowance of this Petition	6
Prayer for Writ	7

BRIEF IN SUPPORT OF PETITION.

ARGUMENT 9

I. The Course of Reasoning and Decision Rendered by the Circuit Court of Appeals in the Case at Bar, as it Relates to the Standard of Care in Seamen's Actions under The Jones Act, was in Conflict with Decisions of this Honorable Court and with Decisions of the Circuit Courts for the Second, Third and Fourth Circuits and was such a Departure from the Accepted and Usual Course of Judicial Proceedings in such Actions, as to Call for the Exercise of this Court's Power of Supervision 9

(a) The decision of the Circuit Court of Appeals for the First Circuit, in approving the trial court's charge of merely general definitions of law and its refusal and failure to instruct the jury on the high degree of care owed to seamen in actions under the Jones Act, was clear error and prejudicial to the petitioner . . . 9

(b) The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second,

Page

Third and Fourth Circuits, substantiate the proposition advanced by the petitioners that a higher degree of care is to be exercised by the master for the protection of his crew, than is required of shore employers and under the common law 11

(c) The authorities cited by the Circuit Court of Appeals, in the case at bar, fail to support and justify the conclusions set forth therein . . 16

II. The Course of Reasoning and Decision Rendered by the Circuit Court of Appeals for the First Circuit, as it Relates to Assumption of Risk in Seamen's Actions Under the Jones Act, was in Conflict with Numerous Decisions of this Honorable Court and with Decisions of the Circuit Court of Appeals for the Second, Third, and Sixth Circuits and was Such a Departure from the Accepted and Usual Course of Judicial Proceedings in Actions Under the Jones Act, as to Call for the Exercise of this Court's Power of Supervision . 18

(a) The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second, Third and Sixth Circuits, substantiate the proposition advanced by the petitioners that assumption of risk is not available as a defense to actions under the Jones Act under any circumstances 18

(b) The Circuit Court of Appeals in its decision, apparently adopted a particular feature of the concurring opinion of Mr. Justice Frankfurter in the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, regarding assumption of risk, which was contrary to that expressed in the majority opinion of this Honorable Court. . 20

CONCLUSION 23

TABLE OF CASES AND AUTHORITIES CITED.

	Page
Alpha S. S. Corp. v. Cain, 281 U. S. 642	14
American Pacific Whaling Co. v. Kristensen, 93 F. (2d) 17	20
Armit v. Loveland (1940 C. C. A. 3rd), 115 F. (2d) 308	15, 20
Beadle v. Spencer, 298 U. S. 124	19
Boston C. C. and N. Y. Canal Co. v. Seaboard Transportation Co., 270 F. 525	17
Buckley v. Frankel (1928), 262 Mass. 13	9, 10
Calmar S. S. Corp. v. Taylor, 303 U. S. 525	13
Chelentis v. Luchenbach S. S. Co., 247 U. S. 372, 380, 381	13
Cleveland-Cliffs Iron Co. v. Martini, 96 F. (2d) 632	20
Cortes v. Baltimore Insular Line (1932), 287 U. S. 367	11, 16
Harris v. Penn. R. Co. (1931 C. C. A. 4th), 50 F. (2d) 866	14
Jacobs v. City of New York (1942), 315 U. S. 752	18
Jamison v. Encarnation, 281 U. S. 635, 639	14
Mary C. Roberts, Administratrix, et al. v. United Fisheries Vessels Company, Fed. (2d)	1, 7
Matson Navigation Co. v. Hansen, 132 Fed. (2d) 487	17
Pratt v. Louisiana & A. Ry. Co. (1943 C. C. A. 5th), 135 F. (2d) 693	22
Socony-Vacuum Oil Co., Inc. v. Smith (1939), 305 U. S. 424, 430, 431	13, 19
Storgard v. France and Canada S. S. Corp. (C. C. A. 2d), 263, F. 545	16
The Arizona v. Anelich (1936), 298 U. S. 110	13, 19
The Iroquois, 194 U. S. 240	17
The New Berne Case, 80 F. (2d) 244	20
The Seeandbee (1939 C. C. A. 6th), 102 F. (2d) 577, 581	20
The S. S. Standard (1939 C. C. A. 2d), 103 F. (2d) 437, 438	19
Tiller v. Atlantic Coast R. Line Co., 318 U. S. 54	2, 17

	Page
Warner v. Goltra, 293 U. S. 155, 157	14
Wicher v. Phinney, 124 Fed. (2d) 929, 933 . . .	17
Act of February 13, 1925, c. 229, Sec. 1	1, 2
Federal Employees Liability Act — U. S. Code, Title 45, Secs. 50–60	3
Jones Act — U. S. Code, Title 46, Sec. 688 . . .	2
U. S. Code, Title 28, Sec. 347	1
Sec. 350	2

In the

Supreme Court of the United States.

OCTOBER TERM, 1943.

No.

MARY C. ROBERTS, ADMINISTRATRIX, ET AL.,
PLAINTIFFS, APPELLANTS, PETITIONERS,
v.
UNITED FISHERIES VESSELS COMPANY,
DEFENDANT, APPELLEE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

The petitioners, Mary C. Roberts, Administratrix of the Estate of Velmer Joseph Roberts and Irene F. Bennett, Administratrix of the Estate of Samuel Cotreau, respectfully pray that a Writ of Certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of *Mary C. Roberts, Administratrix, et al.* v. *United Fisheries Vessels Company,* — Fed. (2d) — (Rec. p. 50), rendered on March 20, 1944, which affirmed the judgment of the District Court, entered on May 15, 1943 (Rec. pp. 9, 11).

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 938; U.S. Code, Title 28, Sec. 347.

This petition was filed within three months from March 20, 1944, the date of entry of the judgment of the Circuit Court of Appeals, as required by Section 8 of the Act of Feb. 13, 1925, *supra* (U.S. Code, Title 28, Sec. 350).

Notice of the filing of this petition, together with a copy of the petition, printed record and supporting brief, has been duly served by the petitioners upon counsel for the respondent and due proof of such service filed with the Clerk, as required by Rule 38 of this Court.

THE QUESTIONS PRESENTED.

There are two fundamental questions here presented:

First: The standard of care required of a master for the protection of members of his crew, in an action under the Jones Act, and, in connection therewith, a further amplification of the definition of "negligence" in seamen's suits under the said act.

Second: Whether assumption of risk is still available as a defense to a seaman's action under the Jones Act, and, in connection therewith, a further amplification of this Court's decision in the case of *Tiller* v. *Atlantic Coast R. Line Co.,* 318 U.S. 54, and the application of the same to actions under the Jones Act.

STATUTES INVOLVED.

These actions are based upon the provisions of Title 46, United States Code, Section 688, commonly known as the Jones Act, which provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any

seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The said statute by reference to the remedy of railway employees, incorporates and adopts as part of its own provisions, Title 45, United States Code, Sections 50-60, inclusive, commonly known as the Federal Employees Liability Act, the applicable provisions of which are as follows:

Section 51. "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . or, in case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, . . ."

Section 53. "In all actions . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

Section 54. "That in any action brought . . . to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; . . ."

STATEMENT OF THE CASE.

These are civil actions, in tort, brought by the respective plaintiffs as the duly appointed administrators of the estates of Velmer Joseph Roberts and Samuel Cotreau. Roberts and Cotreau were fishermen employed on the fishing schooner J. M. MARSHALL and while engaged in the course of their employment on November 28, 1941, met their death by drowning when lost at sea during a storm on said day. The J. M. MARSHALL was a two-mast fishing schooner, known in the industry as a dory fishing vessel and carried a full complement of 21 men, including captain, engineer, cook and eighteen dory fishermen. It generally sailed to the fishing grounds in the North Atlantic Ocean and was fishing Southwest of Seal Island, Nova Scotia, in about three hundred feet of water, when Cotreau and Roberts were lost. Fishing operations were carried on by sending out nine dories from the J. M. MARSHALL, with two men in each dory, and with each of said dories laying out an individual trawl-line on the bottom of the ocean, about a mile and a half in length, with fish being caught by the thousands of hooks attached to said trawl-lines. (Hynes, Rec. p. 20; Moulaison, Rec. pp. 22, 23.)

Cotreau and Roberts were dory-mates, and were in the same dory when a storm suddenly arose. A northwest wind came up with the suddenness of a squall and began blowing about thirty to forty miles per hour; the sea became rough and the tide swung around so that it was running against the wind, causing "rip-tides"; the sea and waves were running continuously at a height of between fifteen to twenty feet and were breaking as high as twenty to thirty feet up in the rigging of the Schooner J. M. MARSHALL. The captain had ordered the men to set two and a half tubs of trawl per dory, and in accordance with the understanding of the dory fishing industry, the fishermen were under or-

ders to remain out in their dories until they finished their job of "making a set" before returning to the vessel; that if they cut their trawl-lines and returned to the vessel before completing their job of "making a set," they would be acting in disobedience of orders, unless a flag was hoisted in the rigging of the vessel, the master's signal to cut trawl-lines because of impending danger and return to the vessel immediately. No flag was hoisted in the rigging that day and the men remained out during the storm, which was increasing in intensity and were last seen in their dory about forty-five minutes after the storm began. The dories were constructed of wood, about eighteen feet in length, and when last seen, the top of the sides of the mid-section of the dory involved, was about nine inches above the level of the water. (Hynes, Rec. p. 21; Moulaison, Rec. pp. 22, 23, 24; Crowell, Rec. pp. 26, 27.)

The plaintiffs filed requests for instructions to the jury and duly saved their exceptions to the court's refusal to instruct the jury on the matters raised by certain requests therein filed. (Rec. pp. 18, 19, 38.)

The jury found for the defendant in each of the said actions in the trial before the District Court and the appeal to the Circuit Court of Appeals for the First Circuit, was based upon the refusal of the trial court to give the instructions requested by the plaintiffs. (Rec. pp. 9, 11, 36).

STATEMENT OF POINTS RELIED UPON IN APPEAL TO CIRCUIT COURT.

The points which the plaintiffs relied upon in their appeal to the Circuit Court, were based upon the trial court's refusal and failure to instruct the jury as follows:

(1) In applying the test of acts and conduct of the master of a vessel, to determine whether the master was negligent, the standard of care to be exercised in

a case under the Jones Act is a higher degree of care than that required of shore employers and under the common law. (Request No. 10, Rec. p. 18.)

(2) If the jury find that the master of the defendant's vessel, while the crew was engaged in fishing from dories on the high seas and including the plaintiffs' intestates, speculated on the length and severity of the stormy conditions of sea and wind, which were then in existence or could have been reasonbly foreseen, and failed to order his men to return to a place of safety on the vessel, this would be evidence of negligence. (Request No. 8, Rec. p. 18.)

(3) If the jury find that there were obvious dangers which the plaintiffs' intestates could have observed and appreciated, yet continued with their work, they cannot be charged with having assumed the risk of such dangers while carrying out the orders of the master of their vessel. (Request No. 11, Rec. p. 19.)

REASONS SUBMITTED FOR THE ALLOWANCE OF THIS PETITION.

First: The course of reasoning and decision rendered by the Circuit Court of Appeals, as it relates to the standard of care in seamen's actions under the Jones Act, was in conflict with decisions of this Honorable Court and with decisions of the Circuit Court of Appeals for the Second, Third and Fourth Circuits and was such a departure from the accepted and usual course of judicial proceedings in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

Second: The course of reasoning and decision rendered by the Circuit Court of Appeals, as it relates to assumption of risk in seamen's actions under the Jones Act, was in conflict with numerous decisions of this Honorable Court and with decisions of the Circuit Court of Appeals for the Second, Third, and Sixth Circuits and was such a departure

from the accepted and usual course of judicial proceedings in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

PRAYER FOR WRIT.

Wherefore, your petitioners, by their undersigned counsel, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled *Mary C. Roberts, Administratrix, et al., Plaintiffs, Appellants* v. *United Fisheries Vessels Company, Defendant, Appellee,* being designated and numbered on its docket October Term 1943, No. 3947, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court, to the end that your petitioners may have the relief therein prayed for and such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

MARY C. ROBERTS, *Administratrix,*
AND
IRENE F. BENNETT, *Administratrix,*
by their Attorney,
H. S. AVERY,
177 State St., Boston, Mass.

Counsel:

A. L. KAPLAN,
177 State St., Boston, Mass.

CERTIFICATE.

I hereby certify that I am counsel for the petitioners herein, Mary C. Roberts, Administratrix and Irene F. Bennett, Administratrix; that in accordance with the request of said petitioners the within petition has been presented; that the allegations contained in said petition are true, to the best of my knowledge and belief; and that said petition is, in my opinion, well founded in law and in fact and should be granted.

H. S. AVERY.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss., Boston, June 10, 1944.

Then personally appeared H. S. Avery of Boston, Massachusetts, and made oath that he caused the foregoing petition to be prepared and signed the same and that same is prepared with the consent of and in accordance with the request of the petitioners named therein and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

ABRAHAM L. KAPLAN,
Notary Public.

[SEAL]

My commission expires March 31, 1950.

BRIEF IN SUPPORT OF PETITION.

In support of the allowance of the petition, the following is respectfully submitted:

ARGUMENT AND AUTHORITIES.

I.

THE COURSE OF REASONING AND DECISION RENDERED BY THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR, AS IT RELATES TO THE STANDARD OF CARE IN SEAMEN'S ACTIONS UNDER THE JONES ACT, WAS IN CONFLICT WITH DECISIONS OF THIS HONORABLE COURT AND WITH DECISIONS OF THE CIRCUIT COURTS FOR THE SECOND, THIRD AND FOURTH CIRCUITS AND WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN SUCH ACTIONS, AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

(a) *The decision of the Circuit Court of Appeals for the First Circuit, in approving the trial court's charge of merely general definitions of law and its refusal and failure to instruct the jury on the high degree of care owed to seamen in actions under the Jones Act, was clear error and prejudicial to the petitioners.*

The error that the petitioners rely on in this connection, relates to the course of reasoning and decision adopted by the Circuit Court of Appeals in approving the action of the trial court in refusing and failing to instruct the jury on the high degree of care owed to seamen and, in connection therewith, to define negligence within the purview of the Jones Act. The duty of the trial judge to properly instruct the jury was clearly set forth in the case of *Buckley* v. *Frankel* (1928), 262 Mass. 13, in which the court said:

> Page 15: "Of course it is the duty of the judge presiding over a jury trial to give full, fair, correct and clear instructions as to the principles of law governing all the essential issues presented, so that the jury may understand their duty and be enabled to perform it intelligently."

Although the trial court instructed the jury that the captain of the vessel in question was bound by what the ordinary careful and prudent and reasonable captain would have done, under the circumstances, yet the petitioners submit that this instruction was inadequate, because the trial court failed to sufficiently instruct the jury on this subject, so that they could intelligently determine what a reasonably careful and prudent captain would, or would not have done, under the circumstances. To instruct the jury, for example, that the defendant was under a duty to provide a seaworthy vessel, with a reasonably safe place to work and reasonably safe tools and appliances, without further instructing the jury so that they could intelligently understand and determine what is a seaworthy vessel, a safe place or safe tools and appliances, is wholly inadequate and requires the jury to base their conclusions of the law upon surmise and conjecture. This might be best illustrated by the necessity of literally thousands of decisions that have been rendered under the Jones Act, defining "seaworthiness," "safe tools and appliances," "safe place to work," etc. Likewise, to instruct the jury to find for the plaintiff, if they found the defendant negligent, without adequately instructing the jury how to determine negligence under the applicable law, would also lead to the same result.

While the petitioners agree that the actions of a reasonably, prudent and careful captain is the standard under the Jones Act, yet they specifically requested that the trial

court further instruct the jury so that the jury could determine what a reasonably prudent and careful captain would, or would not have done, under the circumstances. (Plaintiffs' Requests For Instructions—#8, 10, Rec. pp. 18. 38.) The necessity for the further instructions requested is obvious from the fact that opinion evidence regarding the actions of a reasonably careful and prudent captain in the case at bar, was apparently inadmissible under the circumstances and was not offered by either party. The jury were then left to rely entirely upon the adequacy of the instructions of the trial court, to intelligently understand and pass upon that issue.

Furthermore, in this same connection, the jury was instructed that it was for them to decide what duty was owed by the respondent to the petitioners' intestates, (Rec. p. 13) and the petitioners submit that this was clear error, for it is the function of the trial court to instruct the jury on the duty owed and, in this respect, the jury is strictly limited to finding whether there was a violation of that duty.

(b) *The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second, Third and Fourth Circuits, substantiate the proposition advanced by the petitioners that a higher degree of care is to be exercised by the master for the protection of his crew, than is required of shore employers and under the common law.*

The case of *Cortes* v. *Baltimore Insular Line* (1932), 287 U.S. 367, was an action under the Jones Act for failure to furnish care and cure to a seaman ill with pneumonia and this Honorable Court, through Mr. Justice Cardozo, said:

> Page 376: "We are warned, however, that in giving this context to the statute (that there was a duty to furnish care and cure) we are omitting to give heed to

its reference to the act regulating the remedies of railroad employees, and are ignoring the *standards of duty* thus carried over and adopted. The Employers' Liability Act for the protection of the employees of common carriers by railroad gives a remedy to such employees 'for injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier', or by reason of any negligent defect in its roadbed or equipment. (statute cited) True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. We say except in special circumstances, for it would be hazardous to assert that such a duty may not rest upon the representative of a railroad as well as upon the master of a ship when the servant, exposed by the conditions of the work to extraordinary risks, is helpless altogether unless relief is given on the spot. (cases cited) The result, however, will not be different though we assume that the servant of a railroad company, if he has been injured without fault, may never call for help as due to him of right, however pressing the emergency and (377) imperative the need. *We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water.* The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly'. (case cited) Another court has said: 'The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and

limited.' (case cited) *Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.* There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act because of the failure of the crew of the train to come to the rescue of their comrade. *Harris* v. *Penn. R. R. Co.*, 50 F. (2d) 866, 868. There is little doubt that rescue is a duty when a sailor falls into the sea, *United States* v. *Knowles*, 4 Sawy. 517, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. *Harris* v. *Penn. R. R. Co., supra.* . . . (378) Congress meant no more than this, that the duty must be legal, *i.e.*, imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail." (Italics ours.)

Other references by this Honorable Court to the high degree of responsibility owed to seamen are to be found in the following cases:

Socony-Vacuum Oil Co., Inc. v. *Smith,* (1939) 305 U.S. 424, 430, 431.

The Arizona v. *Anelich* (1936), 298 U.S. 110.

Calmar S.S. Corp. v. *Taylor,* 303 U.S. 525.

Chelentis v. *Luchenbach S.S. Co.*, 247 U.S. 372, 380, 381.

Jamison v. *Encarnation*, 281 U.S. 635, 639.
Alpha S.S. Corp. v. *Cain*, 281 U.S. 642.
Warner v. *Goltra*, 293 U.S. 155, 157.

The case of *Harris* v. *Penn. R. Co.* (1931 C.C.A. 4th), 50 F. (2d) 866, has been cited extensively in describing the unusual relation that exists between a seaman and his ship at sea. In that case, the court in holding the ship liable under the Jones Act for failing to exercise due diligence in attempting to rescue a member of the crew who had fallen into the sea through his own negligence, said:

> Page 868: "The contract of employment involves not merely a surrender of the personal liberty of the seaman to a greater extent than is customary, *Robertson* v. *Baldwin*, 165 U.S. 275, 17 S. Ct. 326, 41 L. Ed. 715, but it imposes upon the employer an exceptional obligation to care for the well being of the crew. . . . There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. He binds himself by the contract of employment to serve the ship during the voyage, and desertion may be made an offense punishable by imprisonment. He owes obedience while on shipboard to his superior officers, and is bound to execute their lawful commands even at the risk of danger to his person or his life; and their right to enforce obedience by proper discipline and punishment has been recognized. If he is taken sick or is injured on board the ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew. *By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general*

rules of common law to those employed in service upon land. From time immemorial, seamen have been called the "wards of admiralty"; and in this country as elsewhere the Legislature has enacted an elaborate system of legislation for their protection. Regardless of legislation, it is uniformly recognized that it is the duty of a vessel to care for a seaman who is taken sick or receives an injury on a voyage in the service of the ship, to the extent of providing medical care and attendance, and, if possible, a cure at the expense of the ship. And it is even required, where a serious accident occurs, that the master shall exercise a reasonable judgment as to putting into the nearest available port, in order that proper treatment may be secured. (Cases cited). Equally clear is the obligation upon the part of the ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency and to deny it in the greater. In both cases, it is implied in the contract (869) that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right." (Italics ours.)

In the case of *Armit* v. *Loveland* (1940 C.C.A. 3d), 115 F. (2d) 308, the court after reviewing the hazardous calling of the seaman and his dependence upon those in charge of his ship, said:

> Page 311: "The same peculiar circumstances attending the employment alike require that the rules of the common law respecting proof of the employer's negligence be not visited too rigorously upon seamen.

> Stated conversely, a higher degree of care is required of the employers of seamen than is required of employers of servants for work ashore."

Likewise, in the case of *Storgard* v. *France and Canada S.S. Corp.* (C.C.A. 2d), 263 F. 545, (cert. den. 252 U.S. 585), in which the court said:

> Page 548: "Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of shore servants."

(c) *The authorities cited by the Circuit Court of Appeals, in the case at bar, fail to support and justify the conclusions set forth therein.*

In discussing the test and standard to be adopted in determining whether the care exercised was proper and whether the master was negligent, (Rec. p. 44) the Circuit Court drew no distinction between actions arising on land and actions under the Jones Act, and, in fact, indicated that no distinction was to be made, as appears from the following sentence:

> Rec. p. 44: "The nature of the business and the particular dangers involved determine the amount of care required in any particular case, whether on land or on sea."

The petitioners further submit that the cases cited by the Circuit Court of Appeals, in the case at bar, as authority for the proposition that the standard to be applied to actions under the Jones Act is the same as that applied to land actions, fail to support and justify the conclusions set forth therein. The case of *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 377, cited by the said court on page 44 of the record, has been previously quoted herein, and the peti-

tioners submit that an examination of this case will clearly indicate that it stands as authority for the proposition that the same standard of care does not apply on land, as on sea, and that the master is required to exercise a high degree of care for the safety of seamen under his command. The next case cited by the said court (Rec. p. 45) is *Tiller* v. *Atlantic Coastline R. Co.*, 318 U.S. 54, which is an action by an employee of a railroad under the Federal Employers Liability Act, which in no way involves or even makes mention of seamen or their rights under the Jones Act. Next is the case of *Matson Navigation Co.* v. *Hansen*, 132 F.(2d) 487 (Rec. p. 45), which makes no mention of the standard of care under the Jones Act as compared with land actions. The case of *The Iroquois*, 194 U.S. 240, quoted by the court, (Rec. p. 45) arose prior to the enactment of the Jones Act and, therefore, has no reference to said act, but even in that case the court said:

> Page 247: "The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not."

The Circuit Court also cited the case of *Boston C.C. and N.Y. Canal Co.* v. *Seaboard Transportation Co.*, 270 F. 525, (Rec. p. 45) which involved cross libels in admiralty arising out of the stranding and sinking of a ship in the Cape Cod Canal. The claims were for damages to the ship and the canal locks and the rights of seamen were not involved, nor were the rights and liabilities arising out of the master and servant relationship under the maritime or common law involved or even discussed. The final case cited by the said court is *Wicher* v. *Phinney*, 124 F.(2d) 929, 933, (Rec. p. 45), which was an action under the New Hampshire Death Statute, arising out of an automobile accident, in which the issue before the court was the interpretation of the "Sudden

Emergency Doctrine'' under the New Hampshire law and the standard of care and definition of ''negligence'' under the Jones Act was neither involved or mentioned in any manner.

The petitioners respectfully submit that the course of reasoning and the decision adopted by the Circuit Court of Appeals, in the case at bar, in approving the trial court's action in refusing and failing to instruct the jury on the high degree of care owed to seamen under the Jones Act, being in conflict with the decisions of this Honorable Court and the Circuit Court of Appeals for the circuits hereinbefore mentioned, was such a departure from the accepted and usual course of judicial proceeding in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

II.

THE COURSE OF REASONING AND DECISION RENDERED BY THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AS IT RELATES TO ASSUMPTION OF RISK IN SEAMEN'S ACTIONS UNDER THE JONES ACT, WAS IN CONFLICT WITH NUMEROUS DECISIONS OF THIS HONORABLE COURT AND WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND, THIRD, AND SIXTH CIRCUITS AND WAS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN ACTIONS UNDER THE JONES ACT, AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

(a) *The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second, Third and Sixth Circuits, substantiate the proposition advanced by the petitioners that assumption of risk is not available as a defense to actions under the Jones Act under any circumstances.*

In the recent case of *Jacobs* v. *City of New York* (1942), 315 U.S. 752, this Court speaking through Mr. Justice Murphy said:

Page 753: "Although proof of negligence is an essential to recovery under the Jones Act, (cases cited) contributory negligence and assumption of risk are not available defenses. The admiralty doctrine of comparative negligence applies."

Also in the case of *Socony-Vacuum Oil Co., Inc.* v. *Smith* (1939), 305 U.S. 424, this Court through Mr. Justice Stone, made an exhaustive review of this defense, both under the admiralty law prior to the Jones Act and also under the Jones Act itself and concluded:

Page 431: "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."

Other recent decisions of this Honorable Court holding that assumption of risk was not an available defense under the Jones Act are,

The Arizona v. *Anelich,* 298 U.S. 110.
Beadle v. *Spencer,* 298 U.S. 124.

Likewise the following excerpts of recent decisions, are illustrative of numerous decisions of the Circuit Courts that assumption of risk is not available as a defense to actions under the Jones Act, under any circumstances:

(1) ". . . The common law doctrine of assumption of risk (was) not a defense to a seaman's action for personal injuries." (*The S.S. Standard,* (1939 C.C.A. 2d) 103 F. (2d) 437, 438).

(2) "The rule of assumed risk or contributory negligence must be applied in admiralty under the doc-

trine of comparative negligence and neither is a bar to recovery but can be invoked only for the purpose of mitigating damages."

(*The Seeandbee,* (1939 C.C.A. 6th) 102 F. (2d) 577, 581).

(3) "Any thought of assumption of risk on the part of the plaintiff is not germane to the question of the ship owners' negligence in the maintenance of the unsafe condition. Assumption of risk is not even available as an affirmative defense to an action under the Jones Act. (cases cited) The peculiar circumstances attendant upon a seaman's discharge of his duties were the justification for the exclusion of assumption of risk as a defense under the Jones Act."

(*Armit* v. *Loveland,* (1940 C.C.A. 3rd) 115 F. (2d) 308, 311).

Other decisions of the Circuit Courts holding to the same effect, are:

American Pacific Whaling Co. v. *Kristensen,* 93 F. (2d) 17.

Cleveland-Cliffs Iron Co. v. *Martini,* 96 F. (2d) 632.

The New Berne Case, 80 F. (2d) 244.

(b) *The Circuit Court of Appeals in its decision, apparently adopted a particular feature of the concurring opinion of Mr. Justice Frankfurter in the case of Tiller v. Atlantic Coast Line R., Co., 318 U.S. 54, regarding assumption of risk, which was contrary to that expressed in the majority opinion of this Honorable Court.*

To illustrate the apparent reliance of the Circuit Court of Appeals on the opinion of Mr. Justice Frankfurter, we submit the following paragraph from its opinion:

Rec. p. 49: "The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover. If the defendant is negligent he cannot avoid the effect of it by pleading assumption of risk. Such a defense is absolutely 'out of the window' since the statute and since the decision in *Tiller* v. *Atlantic Coast Line Co.*, 318 U.S. 54. But, as pointed out by Mr. Justice Frankfurter in his concurring opinion in the Tiller case, Congress 'has left undisturbed the other meaning of "assumption of risk", namely, that an employee injured as a consequence of being exposed to a risk which the employer in the exercise of due care could not avoid, is not entitled to recover, since the employer was not negligent'."

The following excerpts illustrate the contrariety of opinions of Mr. Justice Frankfurter and of the majority of this Honorable Court in the Tiller case:

Opinion of Mr. Justice Frankfurter:

Page 72: " 'Assumption of risk' as a defense where there is negligence has been written out of the act. But 'assumption of risk', in the sense that the employer is not liable for those risks which it could not avoid in the observance of its duty of care, has not been written out of the law."

Majority opinion delivered by Mr. Justice Black:

Page 58: "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

and also

> Page 67: "No case is to be withheld from a jury on any theory of assumption of risk . . ."

The recent case of *Pratt* v. *Louisiana & A. Ry. Co.*, (1943 C.C.A. 5th) 135 F. (2d) 693, interprets this defense in the Tiller case as follows:

> Page 693: "The defense of assumption of risk is not good; the only question is whether the carrier was negligent and, if so, whether that negligence was the proximate cause of Pratt's injury . . ."

(c) *The opinion of the Circuit Court of Appeals, in the case at bar, in sanctioning and approving the trial court's charge to the jury on assumption of risk, was such a departure from the recognized principles of law applicable to actions under the Jones Act, as to call for an exercise of this Court's power of supervision.*

To illustrate the action of the trial court, we quote from the opinion of the Circuit Court of Appeals referring to the case at bar:

> Rec. p. 47: "Counsel for plaintiff requested the court to give the following instruction as to assumption of risk:
>
> "If the jury finds that there were obvious dangers which the plaintiff's intestate could have observed and appreciated, yet continued with his work, he cannot be charged with having assumed the risk of such dangers while carrying out the orders of the master of the vessel."
>
> The instruction was not given, the court charging the jury on this point in part as follows:
>
> ". . . and the law says he assumed the obvious and well known risks of the business in which he is engaged."

"He assumes certain risks but those are the obvious and well known risks that are attendant upon that type of job."

"Then, when a man assumes the risks, obvious and well known risks attendant on the type of occupation he goes into he, of course, does not assume that any one is going to be negligent or any one is going to disregard the duties that are owed to him, but he assumes the other way that they are going to give him the reasonable protection to which he is entitled."

The petitioners submit that the instruction requested was a correct proposition of law, applicable to the case at bar, and the opinion and decision of the Circuit Court of Appeals in sanctioning and approving the trial court's action, was such a departure from the accepted and usual course of proceedings in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

CONCLUSION.

Your petitioners respectfully submit, therefore, that this Honorable Court should grant Certiorari in this case.

Respectfully submitted,

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A. L. KAPLAN,
of Counsel.

(2)

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Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 152.

MARY C. ROBERTS, ADMINISTRATRIX, ET AL., *Petitioners*,

v.

UNITED FISHERIES VESSELS COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT.

ALBERT T. GOULD,
Counsel for Respondent.

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Subject Index.

	Page
History of case	1
Statement of facts	3
Argument	5
First point—Neither the reasoning nor the decision of the Circuit Court of Appeals as it relates to the standard of care in seamen's actions under the Jones Act was in conflict with the decisions of this Court or with decisions of any Circuit Court of Appeals	5
Second point—Neither the reasoning nor the decision of the Circuit Court of Appeals relative to the matter of assumption of risk was in conflict with any decision of this Court or of any Circuit Court of Appeals	10
Conclusion	12

Table of Authorities Cited.

CASES.

Alpha S.S. Corp. v. Cain, 281 U.S. 642	8
Arizona, The, v. Anelich, 298 U.S. 110	7, 12
Armit v. Loveland, 115 F. (2) 308	8
Calmar S.S. Corp. v. Taylor, 303 U.S. 525	7
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372	7
Cortes v. Baltimore Insular Line, 287 U.S. 367	7
Harris v. Penn R. Co., 50 F. (2) 866	8
Iroquois, The, 194 U.S. 240	12
Jamison v. Encarnacion, 281 U.S. 635	8
Socony-Vacuum Oil Co., Inc. v. Smith, 305 U.S. 424	7, 12
Storgard v. France & Canada S.S. Corp., 263 F. 545	8

Page

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 10, 12
Warner v. Goltra, 293 U.S. 155 8

STATUTE.

Merchant Marine Act, 1920 (41 Stat. 1007, 46 U.S.C. Sec. 688) 2, 5, 7, 8, 9

Supreme Court of the United States.

October Term, 1943.

No. 152.

MARY C. ROBERTS, Administratrix, et al., *Petitioners*,

v.

UNITED FISHERIES VESSELS COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

History of Case.

This cause is before the Court upon the petition of Mary C. Roberts, Administratrix, *et al.*, appellants below, for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a decision of that court (Rec. 40-48), which affirmed two final judgments of the United States District Court for the District of Massachusetts in favor of the respondent (R. 9, 11).

The case arises out of two civil actions brought against the respondent by the administratrices of the estates of Velmer Joseph Roberts and Samuel Cotreau. The petitioners' intestates were members of the crew of the fishing

schooner J. M. Marshall, owned by the respondent. On November 28, 1941, while the said schooner was at sea engaged in fishing with trawls, nine dories with two men in each left the vessel to set their trawls in accordance with the custom of trawl fishing. Eight of the nine dories safely returned to the vessel, but the ninth, in which were petitioners' intestates, did not return and could not be found after search (R. 20, 21). Petitioners' intestates were presumably drowned.

The above two actions were brought under Section 33 of the Merchant Marine Act of 1920 (41 Stat. 1007, 46 U.S.C. Sec. 688), commonly known as the Jones Act. The gravamen of the actions was the alleged negligence of the defendant, the sole issue being whether the captain of the J. M. Marshall was negligent in not giving an order to petitioners' intestates to return to the schooner, and, if so, whether that was the cause of the death of petitioners' intestates.

The two actions were tried together on May 13 and 14, 1943, before the District Court with a jury. All the witnesses appeared and testified at the trial in open court with the exception of the captain of the J. M. Marshall, whose testimony, taken by deposition, was offered in evidence (R. 20-32). After argument of counsel and the charge to the jury by the presiding judge, the case was submitted to the jury, which returned verdicts for the defendant in both actions, whereupon judgments for the defendant upon said verdicts after trial were duly entered on May 15, 1943 (R. 9, 11).

On July 12, 1943, the appeals of the petitioners to the Circuit Court of Appeals were perfected (R. 34). The two appeals were thereupon consolidated (R. 36) and were fully heard on January 4, 1944, by the Circuit Court of Appeals for the First Circuit on arguments and briefs of

counsel. After the argument of the appeal and due consideration, the Circuit Court of Appeals filed on March 20, 1944, its opinion affirming the judgments of the District Court and on the same day judgment thereon was entered (R. 48).

No petition for rehearing in the Circuit Court of Appeals was ever filed by either of the petitioners herein.

Statement of Facts.

The respondent is not content to accept the statement contained in the petition for a writ of certiorari which purports to be a statement of the facts of the case, in so far as it differs from the statement of facts contained in the opinion of the Circuit Court of Appeals.

The respondent particularly controverts the statement at the bottom of page 4 and the top of page 5 of the petition for a writ of certiorari, wherein it is stated that, "in accordance with the understanding of the dory fishing industry, the fishermen were under orders to remain out in their dories until they finished their job of 'making a set' before returning to the vessel; that if they cut their trawl-lines and returned to the vessel before completing their job of 'making a set', they would be acting in disobedience of orders, unless a flag was hoisted in the rigging of the vessel . . ."

The record shows that there was a conflict of testimony as to whether the fishermen were required to remain out in their dories until they had completed "making a set" unless a flag was hoisted in the rigging of the vessel. Nine witnesses in all were examined at the trial, three of whom testified that no disobedience to orders was involved if the men returned to the vessel before completing their "set," even though no orders were given to return.

Purdy, who had been captain of the J. M. Marshall, testified that the men use their own judgment about returning to the vessel (R. 32). Cameron, who had been following the dory fishing business for about sixty years, testified that "a man in a dory uses his own judgment as to when to come back to the vessel and does not wait for a signal from the captain" (R. 31). Nowe testified that "it is up to the men in the dory to determine how much fish to place in a dory. As a rule, the captain puts a flag in the rigging if it becomes dangerous" (R. 30). All of these witnesses were members of the crew of the J. M. Marshall at the time petitioners' intestates were lost. Hynes, captain of the J. M. Marshall, testified that it is customary in the dory fishing industry for the captain to put a flag in the rigging if he wants the men to come back before completing their work (R. 21), but he did not testify that the men could not use their own judgment and return to the vessel whenever they wished to do so. In its opinion, the Circuit Court of Appeals referred to this conflict of testimony (R. 44).

As the sole issue in the case was whether the captain of the J. M. Marshall was negligent in not setting a flag to call the men in, the failure of petitioners to refer to the conflict of testimony as to whether the fishermen were under orders not to return to the vessel until they had made their "set" unless a flag was hoisted in the rigging calls for correction of petitioners' misstatement of the facts.

Argument.

First Point.

Neither the reasoning nor the decision of the Circuit Court of Appeals as it relates to the standard of care in seamen's actions under the Jones Act was in conflict with the decisions of this Court or with decisions of any Circuit Court of Appeals.

As the Circuit Court of Appeals points out, the trial court "charged the jury that the applicable standard of care was that of an ordinarily careful and prudent ship's master under the circumstances then present" (R. 42). The Circuit Court of Appeals then quotes the language used by the trial court in charging the jury as to the standard of care required of the captain of the J. M. Marshall (R. 42) and states that the "appellants cannot complain of these instructions, nor of other parts of the charge of the same tenor" (R. 42).

In fact, the petitioners admit that this is so, for they say: ". . . the petitioners agree that the actions of a reasonably prudent and careful captain is the standard of care under the Jones Act . . ." (Brief in Support of Petition, p. 10). This, we submit, disposes of Point I of petitioners' argument.

While no further argument by respondent seems required to show that there is no basis for the first reason given by petitioners as a ground for granting a writ of certiorari in this case, we wish to point out that petitioners' statement at the bottom of page 10 and top of page 11 of their brief that "they specifically requested that the trial court further instruct the jury so that the jury could determine what a reasonably prudent and careful captain would, or would not have done, under the circumstances" is not a correct statement of fact. The record shows that

no such request was made. Furthermore, such a request if made, should have been refused. The court having, by petitioners' admission (Petitioners' Brief, p. 10), properly instructed the jury as to the standard of care required of the captain of the vessel, had no right to instruct the jury as to what the captain should, or should not, have done under the existing circumstances. That determination was wholly the province of the jury to make on the evidence in the case, and it would have been clear error on the part of the trial court to invade the functions of the jury by expressing the court's opinion as to whether the captain, under the circumstances, should, or should not, have ordered the men to return.

The statement made by petitioners on page 11 of their brief that "the jury was instructed that it was for them to decide what duty was owed by the respondent to the petitioners' intestates" is incorrect. The trial judge instructed the jury as to "the specific duty that they [defendant] owed these plaintiffs, or, rather, owed the seamen, and these fishermen are seamen, to give them a reasonably safe place to work and reasonably safe tools and appliances with which to work and reasonably safe fellow employees" (R. 13).

The fact that the trial court, notwithstanding the conflict of testimony as to whether the dorymen could exercise their own judgment about returning to the vessel, charged the jury to find for the petitioners if it found that an ordinarily careful and prudent and reasonable captain would have called his men back and the captain in this case failed to do so *for any reason whatsoever* (R. 14, 42) was particularly favorable to the petitioners.

The captain of the J. M. Marshall testified that "it was not so bad, you know, to put a flag in the rigging. I did not think it was that bad to call them in until the dories were

coming in with their trawls" (R. 21). He also testified that "the men came back to the vessel when their work was done" (R. 21). The fact that all the other dories, with their loads of fish, returned safely to the vessel (R. 21) gives rise to the inference that petitioners' intestates were lost because they overloaded their dory, or, in some manner wholly unconnected with any negligence of respondent's captain, caused their dory to capsize.

The decisions of this Court and of the Circuit Court of Appeals for the Second, Third and Fourth Circuits, referred to at pages 11-17 of petitioners' brief, are not in conflict with the decision of the Circuit Court of Appeals in this case.

Cortes v. *Baltimore Insular Line*, (1932) 287 U.S. 367, dealt with the failure of a shipmaster to furnish proper medical care to a seaman who had contracted pneumonia. The issue was whether the Jones Act required the master to furnish medical attention inasmuch as the Federal Employers' Liability Act did not require employers of railway employees to furnish medical aid.

Socony-Vacuum Oil Co., Inc. v. *Smith*, (1939) 305 U.S. 424, was a case of personal injury to a seaman caused by a defect in the equipment of the ship.

The Arizona v. *Anelich*, (1936) 298 U.S. 110, dealt with an action to recover for the death of a fisherman caused by a defective winch which he was operating. The case turned on the question of whether the decedent assumed the risk of operating the defective appliance.

Calmar S.S. Corp. v. *Taylor*, (1938) 303 U.S. 525, dealt wholly with the extent of the legal duty to furnish care and maintenance to a sick seaman. The question of negligence was not an issue.

In *Chelentis* v. *Luckenbach S.S. Co.*, (1918) 247 U.S. 372, the sole issue was whether Section 20 of the Merchant

Marine Act of 1915 changed the rule as to the right of a seaman to recover an indemnity for the negligence of the master.

The issue in *Jamison* v. *Encarnacion*, (1930) 281 U.S. 635, was whether the term "negligence" as used in the Federal Employers' Liability Act included an assault on a member of the crew by a foreman in charge.

Alpha S.S. Corp. v. *Cain*, (1932) 281 U.S. 642, was a case of assault upon a seaman, wherein, following *Jamison* v. *Encarnacion*, it was held that an assault is negligence within the meaning of the Federal Employers' Liability Act.

In *Warner* v. *Goltra*, (1935) 293 U.S. 155, the issue was whether the words "any seaman" in the Jones Act includes the master of the vessel, so as to entitle the master to sue for personal injuries caused by negligence of a pilot employed by the owner of the vessel.

The issue in the case of *Harris* v. *Penn R. Co.*, (1931) 50 F. (2) 866, was whether there was any legal duty to rescue a seaman who had fallen overboard through his own negligence.

Armit v. *Loveland*, (1940) 115 F. (2) 308, was an action to recover for injuries caused by defective equipment of the ship, viz., absence of splash plates which permitted oil to escape and cause a ladder to become slippery. The language of the court quoted at pages 15-16 of petitioners' brief relates solely to the care required in supplying proper equipment.

Storgard v. *France & Canada S.S. Corp.*, (1920) 263 F. 545, was an action for indemnity brought under the general maritime law for an injury caused by alleged unseaworthiness of the vessel, viz., a defective bolt in a mast band. The language of the court quoted on page 16 of petitioners' brief refers only to the degree of care required of employers of seamen with respect to supplying the ship with proper equipment.

The following excerpt from the opinion of the Circuit Court of Appeals in this case correctly summarizes the decisions relied upon by the petitioners. The court said (R. 46-47):

> "It should be noted that no question of unseaworthiness of the vessel or defective equipment of the vessel or her dories is involved here. Most of the numerous decisions in the books, including those relied upon by the plaintiffs, are concerned with the use of appliances furnished or under the control of the employer, and are not applicable."

At page 16 of their brief, petitioners quote a sentence from the opinion of the Circuit Court of Appeals in this case which appears on page 43 of the record and not page 44 as stated in petitioners' brief. It is obvious that the petitioners have misconstrued this sentence in contending, as they do, that no distinction was drawn by the Circuit Court of Appeals between actions arising on land and actions under the Jones Act. While it is true that the standard of required care remains the same in all cases, whether on land or on the sea, the nature of the business and the particular dangers involved determine the amount of care required whether the case arises on land or on the sea and this is what the Circuit Court of Appeals correctly pointed out in accordance with the well settled law.

As the Circuit Court of Appeals stated in its opinion (R. 43): "The test or standard to be adopted in determining whether the care used is proper and commensurate with the danger is the supposed conduct under the circumstances of a reasonable and prudent man. Failure to use the care that a reasonable and prudent man would use under like circumstances is the usual concept of negligence."

In other words, the circumstances arising at sea determine the care required of a shipmaster and the circumstances arising on land determine the care required of an employer of land employees. The standard remains the same in both cases.

The decisions referred to of the Circuit Court of Appeals (R. 43-44), including the recent decision of this Court in *Tiller* v. *Atlantic Coast Line R. Co.*, (1943) 318 U.S. 54, are entirely in accord with and are authority for the decision of the Circuit Court of Appeals in this case.

Second Point.

Neither the reasoning nor the decision of the Circuit Court of Appeals relative to the matter of assumption of risk was in conflict with any decision of this Court or of any Circuit Court of Appeals.

The petitioners' second and final reason submitted for the allowance of their petition is based on a misconception of the decision of the Circuit Court of Appeals and of respondent's position in this case.

Neither the court nor the respondent took the position that assumption of risk was a defense if there was any negligence whatsoever on the part of respondent.

The Circuit Court of Appeals said (R. 47):

> "The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover. If the defendant is negligent he cannot avoid the effect of it by pleading assumption of risk. Such a defense is absolutely 'out of the window' since the statute and since the decision in *Tiller* v. *Atlantic Coast Line Co.*, 318 U.S. 54."

Again, the court said (R. 47):

> "The only question raised in this case, and the one properly submitted to the jury, was whether the captain was negligent in not giving an order, and, if so, whether that was the cause of the accident."

The court also said (R. 46):

> "The defense called 'assumption of risk' can no longer be made in an action controlled by the applicable provisions of the Federal Employers' Liability Act, Section 54 . . ."

Likewise, respondent has conceded throughout the case that Section 54 of the Federal Employers' Liability Act, by its express terms, abolished the defense of assumption of risk where the injury or death resulted in whole or in part from the negligence of the defendant or of those for whose acts it was responsible.

The Circuit Court of Appeals also pointed out in its opinion (R. 47) that the trial judge properly charged the jury that petitioners' intestates did not assume any risk if there was negligence on the defendant's part.

The record contains clear and specific statements by both the trial court and the Circuit Court of Appeals that the only issue in the case was whether the captain was negligent in not ordering the men to return to the vessel and, if so, whether that was the cause of the loss of life. The record also contains the further statements by both courts that assumption of risk was no defense if the defendant was negligent.

Notwithstanding this, petitioners contend (Petitioners' Brief, p. 20) that the Circuit Court of Appeals "apparently adopted a particular feature of the concurring opin-

ion of Mr. Justice Frankfurter in the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, regarding assumption of risk, which was contrary to that expressed in the majority opinion of this Honorable Court."

It requires no argument to show that the excerpt from Mr. Justice Frankfurter's concurring opinion in the Tiller case is not at variance with the opinion of the Court in the same case delivered by Mr. Justice Black. Both opinions are also in harmony with the decisions of this Court in *The Iroquois*, (1904) 194 U.S. 240, *The Arizona* v. *Anelich*, (1935) 298 U.S. 110, and *Socony-Vacuum Oil Co., Inc.* v. *Smith*, (1939) 305 U.S. 424, in all of which decisions this Court held that, in the absence of negligence on the part of the employer, a seaman assumes the ordinary risks incidental to a seafaring life.

Conclusion.

The respondent respectfully submits that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ALBERT T. GOULD,

Counsel for Respondent.